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Report on

Intentional Interference With Domestic Relations

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON INTENTIONAL INTERFERENCE WITH DOMESTIC RELATIONS

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TABLE OF CONTENTS

	Page
I Introduction	1
A. General	1
B. Definitions	2
C. Responses to the Working Paper	2
D. Scope of this Report	2
II Intentional Interference With the Family	4
A. Damages for Adultery	4
1. History of the Action	4
2. Basis of a Claim for Damages for Adultery	5
3. Measure of Damages	6
4. Quantum	6
5. Costs	6
B. Alienation of Affections	7
C. Enticement and Harbouring of a Spouse	8
1. Enticement	8
2. Harbouring	8
3. Damages	9
D. Enticement, Harbouring and Seduction of a Child	9
1. Enticement and Harbouring	9
2. Seduction	10
3. When is a Parent Owed Services by a Child?	12
E. Summary	13
III Reform	14
A. General	14
B. Damages for Adultery	14
C. Enticement and Harbouring of a Spouse	15
1. The General Trend	15
2. New Zealand	16
3. Recommendation	17
D. Enticement and Harbouring of a Child	17
E. Seduction of a Child	22
F. Application	23
IV Conclusion	25
A. Statutory Remedy	25
B. List of Recommendations	26
C. Acknowledgments	27

To the Honourable Brian Smith, Q.C.,
Attorney General of the Province of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON INTENTIONAL INTERFERENCE WITH DOMESTIC RELATIONS

A number of civil actions ostensibly protect family relationships from the intentional interference of third parties. These actions are anachronistic and largely ineffective. The extent to which it is necessary or desirable to retain these remedies is the subject of this Report.

CHAPTER I INTRODUCTION

A. General

Marriage is more than community approved ritual that permits a couple to live together as man and wife. Marriage transforms their legal status, and their rights and responsibilities. Those rights and responsibilities can be identified generally, and are often referred to in the marriage vows. To love, honour and cherish (obey no longer being fashionable) is a fair, if vague, summary of them. Those simple words conceal an intricate array of obligations, many, but not all, of which are mutual. Some of these obligations are protected only by moral sanction, but many are recognized by the law.

Mutual rights and obligations assumed by marriage have been the subject of legal controversy for generations, but are fairly easy to list. Currently these include the right to share in family assets, and rights of alimony and maintenance. The task of identifying the rights arising between either a husband and wife, or a parent and child, is much easier than determining what sanctions exist, or should exist, to prevent another person from interfering with these relationships. Here the law encounters difficulties.

Those difficulties arise, in part, from the problem of characterizing or defining marriage and family. The clumsiness of legal definition, often masked by subtle complexities, becomes apparent. Is marriage like a contract? A partnership? A purchase of property? What incidents flow from the relationship of husband and wife or parent and child?

The current law of British Columbia, which provides remedies for intentional interference with domestic relations, derived from feudal concepts of "master and servant."[1] A man's wife and children were regarded as his servants and as his property. Marriage was considered to create a unity between husband and wife, in which the wife's legal personality was submerged within her husband's. Consequently, only the husband could enforce rights arising from marriage. Clearly, to the extent that it is based on this conception, the law has not kept in step with contemporary views of marriage.

It is even doubtful whether the analytic framework of remedies provided was appropriate when it was first created at common law. Being unable to develop reasonable remedies to protect domestic relations, by reason of archaic procedural limitations, the courts were obliged to adapt inappropriate forms of action to this purpose. The action available to a master who had been wrongfully deprived of his servant's services was a convenient one for the courts to adapt for use by a husband or father who had been wrongfully deprived of the services of his wife or children. The action, called *per quod servitium amisit*, permitted a husband to recover damages for loss of the services of his child or his wife. It also allowed a husband to recover damages for the loss of his wife's society.

In recent years, the actions which have developed from this common law source have been subjected to considerable criticism by law reform agencies, writers and judges. These actions may be divided into intentional and negligent interference with family relations. In this Working Paper we examine the remedies for intentional interference with family relations, which include the actions of damages for adultery, alienation of affections, enticement and harbouring of a spouse, enticement and harbouring of children, and seduction.

[1] John G. Fleming, *The Law of Torts*, (4th ed., 1971) at 570.

B. Definitions

The antiquity of the actions examined in this Report is responsible for the use of a number of technical terms, the definitions of which should be kept in mind.

At common law, a wife was regarded as the property of her husband,[2] as were his children. A man had certain rights with respect to his wife and children. From his wife, he had a right of *servitium* and of *consortium*. From his children he had a right of *servitium*. *Servitium* means service.[3] *Consortium* refers to "the right of one spouse to the company, assistance, affection and fellowship of the other."[4] Fridman states:[5]

> The right, or "interest," which he possessed, and which gave rise to a corresponding duty on the part of other people not to interfere with it, was compendiously styled his *consortium* . . . The definition of consortium is a matter of some complexity. But it can be said to include what have been called a material and sentimental side. In the former came the obligations of the wife to serve and afford material assistance to her husband. . . . In the latter came the obligations to be a companion to her husband, and provide him with love, affection and sexual intercourse. Injury to, or interference with, her might deprive the husband of these advantages.

Although there is no fixed practice,[6] the term *consortium* often includes *servitium*.

C. Responses to the Working Paper

This Report was preceded by Working Paper No. 42, Intentional Interference with Domestic Relations. Given that the Working Paper concerned a number of archaic actions which appear to have little contemporary utility, we did not expect it to generate a significant amount of comment, and were surprised by the number of responses we received. Those responses were thoughtful and extremely useful in the preparation of this Report. We will refer to various issues raised by our correspondents later in this Report, when we consider recommendations for reform.

D. Scope of this Report

Loss of servitium or of consortium may result from another's negligence or intentional act. For example, A, by his negligence, may be responsible for an automobile accident in which B's spouse is injured. Those injuries may deprive B of his spouse's *servitium* and *consortium*, and B may be able to maintain an action against A to recover damages for that loss. We received one response which suggested that the Commission should examine the law governing damages to a spouse for injury inflicted by a third party's negligence on the other spouse.

In this Report, we examine causes of action available to one spouse who has been deprived of his spouse's *servitium* or *consortium* through another's *intentional* act. Actions based on another's negligent or intentional act, are similar since they provide similar relief. That would suggest that it might be appropriate to discuss in this Report actions for negligent interference with

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[2] *Butterworth* v. *Butterworth and Englefield*, [1920] P. 126 at 132, 89 L.J.P. 151; Jacob Lippman, "The Breakdown of Consortium," (1930) 30 Colum. L. Rev. 651 at 653; Peter Brett, "Consortium and Servitium: A History and Some Proposals (Part 1)," (1955) 29 A.L.J. 321 at 328; G.H.L. Fridman, "Consortium as an 'Interest' in the Law of Torts," (1954) 32 Can. B. Rev. 1065 at 1066.

[3] *Jowitt's Dictionary of English Law*, (2nd. ed.), 1639.

[4] *Ibid.* 428.

[5] Fridman, *supra*, n. 2 at 1067. *See also* Martel D. Popescul, "Action Per Quod Consortium Amisit," (1978-79) 43:2 Sask. L.R. 27 at 41 and *Mitchell* v. *Jolly*, [1960] O.R. 470 (Ont. C.A.) *per* Laidlaw J.A. at 475-476.

[6] *Best* v. *Samuel Fox & Co. Ltd.*, [1952] 2 All E.R. 394, [1952] A.C. 716, (H.L.), *per* Lord Reid at 735 (A.C.).

domestic relations. Nevertheless, significantly different considerations are involved. Those issues were not canvassed in the Working Paper which preceded this Report, and it would be inappropriate to consider making recommendations for their reform without soliciting the views and comments of the profession and of the public. The Commission expects to examine damages for loss of *servitium* or of *consortium* arising from negligence in a subsequent project.

CHAPTER II — INTENTIONAL INTERFERENCE WITH THE FAMILY

In this chapter, we examine the following actions providing remedies against those who intentionally interfere with family relationships:

(1) damages for adultery;
(2) alienation of affections;
(3) enticement and harbouring of a spouse;
(4) enticement and harbouring of a child; and
(5) seduction of a child.

A. Damages for Adultery

1. History of the Action

The action of damages for adultery is created by statute.[1] At common law, a husband had a right of action against someone who committed adultery with his wife, notwithstanding that the wife consented to the adultery.[2] The action was for "criminal conversation" and was available only to a husband.

The action for criminal conversation was abolished in England by the *Divorce and Matrimonial Causes Act, 1857*.[3] It was replaced with the action of damages for adultery, which was based on the same principles as the common law action.[4] The English *Divorce and Matrimonial Causes Act, 1857*, was first enacted in British Columbia as part of the 1897 Revised Statutes,[5] although it had earlier been regarded as in force as part of our "received law."[6]

In 1972, the British Columbia *Divorce and Matrimonial Causes Act* was replaced by the *Family Relations Act*.[7] The right to bring an action for damages for adultery was retained. But the express provision that the principles relating to actions for criminal conversation be applied to actions for damages for adultery was repealed.[8] Although the statutory right of action was extended to both spouses,[9] a wife has rarely succeeded in recovering damages against her husband's lover.[10]

In 1978, a new *Family Relations Act*[11] came into force. Section 76 (1) of that Act retains the action of damages for adultery, and provides as follows:

> **Damages and costs from adulterer**
>
> **76.** (1) A spouse may claim damages from a person who has committed adultery with his spouse.

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[1] *Family Relations Act*, R.S.B.C. 1979, c. 121, s. 76.

[2] The wife was considered "no more capable of giving a consent which would prejudice the husband's interest than was his horse:" William L. Prosser, *Handbook of the Law of Torts*, (1964, 3d ed.) at 896-7.

[3] 20 & 21 Vict., c. 85, ss. 59, 33.

[4] There were, however, a few differences. Under the new action, the damages could be applied for the benefit of the wife or children: *Ibid.* s. 33. As well, condonation could be a defence whereas it had only been a factor in mitigation of damages previously: *Bernstein* v. *Bernstein*, [1893] P. 292 (C.A.); *see also* J.M. MacIntyre, "Does Condonation Bar a Husband's Claim for Damages?," (1957) 2 U.B.C.L.N. 517.

[5] *Divorce and Matrimonial Causes Act*, R.S.B.C. 1897, c. 62.

[6] *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 2. The issue of whether the *Divorce and Matrimonial Causes Act* was applicable to British Columbia and was received law arose in *M., Falsely called S.* v. *S.*, (1877) 1 B.C.R. (Pt. 1) 25 (B.C.S.C.). Although Begbie C.J. did not agree with the majority that the whole Act was in force, all agreed that the section abolishing the action for criminal conversation was received (at 33, 53 and 66). The Consolidation Commissioner noted his doubts as well on the applicability of the statute as a whole in his *First Report—Draft Revised Statutes of British Columbia* (1896) at 6 and D39. For a discussion of the history of this period, *see Sheppard* v. *Sheppard*, (1908) 13 B.C.R. 486 (B.C.S.C.) and *Watts* v. *Watts*, [1908] A.C. 573 (P.C.) which approved the majority decision in *S.* v. *S.*; *see also Rutherford* v. *Rutherford et al.*, (1979) 120 D.L.R. (3d) 473, [1980] 2 W.W.R. 330, 14 R.F.L. (2d) 41 (B.C.S.C.) *aff'd.* [1981] 6 W.W.R. 485, 30 B.C.L.R. 145 (B.C.C.A.).

[7] S.B.C. 1972, c. 20.

[8] For a discussion of this and the new Act's effect on the defence of condonation *see* Davies, *Power on Divorce and Other Matrimonial Causes*, (3d. ed., 1980) Vol. II at 119-120 and 122-3. Nor did it expressly provide that the damages could be applied for the benefit of the other spouse or children. *Ibid.* at 125.

[9] *Supra*, n. 7, s. 7.

[10] *Donaldson* v. *Donaldson*, Unreported decision of Mackoff J. No. 5936/D624404, Vancouver Registry, March 1, 1977; *Parkes* v. *Parkes and Audette*, (1980) 18 R.F.L. (2d) 7 (B.C.S.C.).

[11] S.B.C. 1978, c. 20; now R.S.B.C. 1979, c. 121.

2. Basis of a Claim for Damages for Adultery

In an action brought by a spouse against a defendant who has committed adultery with the other spouse, it is generally considered that proof of adultery is not in itself sufficient to justify an award of damages.[12] It must also be established that the defendant was either guilty of enticement, or of hindering the reconciliation of the spouses.[13]

The court generally takes into consideration whether the defendant caused the marital breakdown, or whether the marriage had already broken down.[14] The spectrum of actionable behaviour is quite wide and defendants have been held liable even where the court has speculated that the chances of the marriage continuing were not very good in any event.[15] Although, in the majority of cases, the defendant found liable played a fairly substantial role in the marriage breakdown, on occasion liability has been imposed on a person unlucky enough to be one of a long series of lovers or the last straw before marital breakdown.

Even though the action may be brought by either spouse, the fact that adultery alone is insufficient to found the action means that a wife may be unable to satisfy the court that the defendant enticed her husband or hindered their reconciliation.[16] Taylor J. made the following observations in *Lozada* v. *Lozada et al.*:[17]

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[12] *Forster* v. *Forster and Sengara*, unreported decision, No. 5936/D037106, Vancouver Registry, July 22, 1981 at 10, [1981] B.C.D. Civ. 1654-11. *Rutherford* v. *Rutherford et al.*, (B.C.S.C.), *supra*, n. 6; *Grant* v. *Grant and Johnston*, (1980) 11 F.L.D. 387 (B.C.S.C.); *Mitchell* v. *Mitchell and Duesterwald*, Unreported decision of Darling L.J.S.C. No. 5935/D038450 A800042, Vancouver Registry, June 1, 1981 at 7, [1981] B.C.D. Civ. 1589-03. *Watters* v. *Watters and Stewart*, Unreported decision of Arkell L.J.S.C. Vernon Registry No. 593801770, April 22, 1980, *affd.* B.C.C.A. Unreported decision, Vancouver Registry No. CA800353, May 12, 1981, [1981] B.C.D. Civ. 1572-02. *Calfa* v. *Calfa and Holt*, Unreported decision of Perry L.J.S.C. Prince George Registry No. 5927-02559, January 20, 1981 at 13-14, [1981] B.C.D. Civ 1572-01.

[13] *Rutherford* v. *Rutherford et al.*, *supra*, n. 6; *Smith* v. *Smith and Morrow*, (1978) 3 R.F.L. (2d) 13, 19 (B.C.S.C.); *Leighton* v. *Leighton and Swanson*, (1963) 41 D.L.R. (2d) 166 at 170 (B.C.C.A.); *Davies* v. *Davies*, (1980) 17 R.F.L. (2d) 130 at 138 (B.C.S.C.); *Jestley* v. *Jestley and Nissen*, (1977) 4 B.C.L.R. 213 (B.C.S.C.); *Beveridge* v. *Beveridge and McMillan*, (1978) 7 F.L.D. 438 (B.C.S.C.) at 440; *Sherk* v. *Sherk and Carswell*, (1962) 33 D.L.R. (2d) 94 at 96 (B.C.S.C.); *Todesco* v. *Todesco and Hackett*, (1978) 6 F.L.D. 389 (B.C.S.C.) at 391 *per* Macdonell J.:

> I have to be satisfied that he was instrumental in breaking up the marriage . . . It is my view that Mr. Hackett had nothing to do with the breakdown of the marriage as by the time he met Mrs. Todesco the marriage was finished.

See also Lozada v. *Lozada et al.*, (1980) 120 D.L.R. (3d) 506 at 508 (B.C.S.C.); *Peterson* v. *Peterson*, (1978) 6 F.L.D. 418, 424 (B.C.S.C.).

A common variant of this formula is whether the defendant's actions made reconciliation impossible: *Anderson* v. *Anderson et al.*, [1971] 1 W.W.R. 79, 4 R.F.L. 4, 16 D.L.R. (3d) 252 (B.C.S.C.). *Warman* v. *Warman and Root*, (1975) 20 R.F.L. 162, 54 D.L.R. (3d) 298 (B.C.S.C.) at 169 (R.F.L.). *Bryant* v. *Thorn*, Unreported decision of MacKinnon L.J.S.C. Vancouver Registry No. 5936/D935540, March 25, 1981 at 4, [1981] B.C.D. Civ. 1647-15. Using the "impossibility" test rather than the "interference" test can lead to different results: *Kemperman* v. *Kemperman and Stewart*, (1979) 10 F.L.D. 62 (B.C.S.C.). *Dong* v. *Dong and Courtney*, 1 F.L.D. 165 (B.C.S.C.). *Kincaid* v. *Kincaid and Borman*, (1978) 8 F.L.D. 244 (B.C.S.C.); *Korteling* v. *Korteling and Buse*, digested at (1974) 3 F.L.D. 24 (B.C.S.C.), Unreported decision of Munroe J. Vancouver Registry No. 5936/18525, September 16 & 17, 1974 at 3. It is not clear whether in *Brock* v. *Brock and Thom*, (1979) 11 F.L.D. 75 (B.C.S.C.) the test was impossibility or interference with reconciliation. But Proudfoot J. at 78 indicated:

> I think the best way to describe his position is the straw that broke the camel's back . . . It is difficult to understand that Mr. Brock felt that a reconciliation was possible . . . Mr. Brock was obviously not realistic in his assessment of the situation.

In *Calfa* v. *Calfa and Holt*, *supra*, n. 12 Perry L.J.S.C. recognized, at 14, that both the interference and impossibility tests are used.

[14] *Blackburn* v. *Blackburn and Jones*, (1977) 5 F.L.D. 226 (B.C.S.C.), at 227. *Zamba* v. *Zamba*, (1966) 60 D.L.R. (2d) 178 (B.C.S.C.) at 185; *Dahl* v. *Dahl and Arnold*, (1967) 62 W.W.R. 348 (B.C.S.C.) at 353.

[15] For example, in *Watters* v. *Watters and Stewart*, *supra*, n. 12, Arkell L.J.S.C. although he did find interference with reconciliation, stated at 21:

> Even if the Co-respondent did not entice or induce the Respondent, she was, obviously, a willing partner, it is nevertheless clear that he was aware that she was married.

See also Blackburn v. *Blackburn and Jones*, *supra*, n. 14 at 227. *Beveridge* v. *Beveridge*, *supra*, n. 13 at 442. *Squire* v. *Squire and Coneybeer*, [1947] 2 W.W.R. 284 (B.C.S.C.) at 285. *Kraft* v. *Kraft*, (1969) 8 D.L.R. (3d) 744 (B.C.S.C.) at 751.

[16] *Mallett* v. *Mallett and Kalynchuk*, (1976) 24 R.F.L. 389 (B.C.S.C.) at 394; *Guinn* v. *Guinn and Gray*, (1981) 29 B.C.L.R. 277 (B.C.S.C.) at 285; *Cruise* v. *Cruise and McKellar*, (1979) 10 F.L.D. 445, 449; *Parkes* v. *Parkes and Audette*, (1980) 18 R.F.L. (2d) 7 (B.C.S.C.) at 10; *Jarvis* v. *Jarvis and Silva*, (1979) 14 R.F.L. (2d) 1 at 11; *Scott* v. *Scott and Miller* (1979) 11 B.C.L.R. 173 at 179; *Lozada* v. *Lozada et al.*, *supra*, n. 13 at 508; *Forster* v. *Forster and Sengara*, *supra*, n. 12; *Polgase* v. *Polgase*, (1980) 12 F.L.D. 136, 142.

[17] *Supra*, n. 13 at 508.

> Accepting that co-respondents of both sexes are to be treated in the same way under the new legislation, it must still be recognized, I think, that the sexes are not, in fact, the same; to pretend they are would be to create a legal fiction out of a statute designed to promote realism in the field of family relations. Until the ways of mankind change markedly, it will, I think, be more difficult to persuade a Court that a woman has overborne or dominated a married man, and lured or enticed him away from his spouse, than that a man has done those things in respect of a woman.

3. Measure of Damages

Before 1972, damages were measured by the value of the wife to the husband.[18] Damages were intended to compensate the plaintiff for the loss of his spouse's society (*consortium*) and services (*servitium*). The plaintiff was also compensated for the blow to his marital honour, and injury to his feelings and to his family life. The measure of damages under this last head depended to a large extent on the conduct of the defendant. The defendant's rank and fortune were also significant.[19]

In 1972, the passage of the *Family Relations Act* introduced two new factors to measuring damages for adultery. The Act abolished damages for loss of *consortium*[20] and extended the action of damages for adultery to wives.[21] As we observed earlier, *consortium* is a term of art which may also include *servitium*. Consequently, it is arguable that a plaintiff may now recover damages only for the blow to his marital honour, injured feelings and hurt to family life.

4. Quantum

The quantum of damages awarded is usually modest, particularly in recent years.[22] Injury to feelings is often a significant factor.[23]

5. Costs

Contrary to the usual rule that costs follow the event, in an action for damages for adultery, costs can be awarded against a defendant who succeeds in having the action dismissed. Section 76 (2) of the *Family Relations Act* provides as follows:[24]

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[18] *Mowder* v. *Roy*, [1946] 2 D.L.R. 427 (Ont. C.A.) at 437–9, based upon the leading English case, *Butterworth* v. *Butterworth and Englefield*, [1920] P. 126. Cited with approval in *Powell* v. *Billington*, (1958) 27 W.W.R. 24 (B.C.S.C.) at 27-8.

[19] *Butterworth* v. Butterworth & Englefield, *ibid.* at 129; *Powell* v. *Billington*, *ibid.* at 28.

[20] *Supra*, n. 7, s. 4 (1).

[21] *Ibid.* s. 7 (1).

[22] *Williams* v. *Williams and Hutton*, (1909) 11 W.L.R. 498 (B.C.S.C.), ($5000); *Hepburn* v. *Hepburn and Watt*, [1947] 1 W.W.R. 804 (B.C.C.A.) *affg.* B.C.S.C., ($5000); *Squire* v. *Squire and Conoyboer*, [1947] 2 W.W.R. 284 (B.C.S.C.), ($5000); *Von Borman* v. *Von Borman and Ultsch*, (1957) 26 W.W.R. 217 (B.C.S.C.), ($3000); *Powell* v. *Billington* (1958), *supra*, n. 18, ($5000); *Ahola* v. *Ahola and Tonnroos*, (1959) 31 W.W.R. 93 (B.C.S.C.), ($6500); *Leighton* v. *Leighton and Swanson* (1963), *supra*, n. 13, (reduced to $1000 from $7500); *Zamba* v. *Zamba*, (1966) *supra*, n. 14, ($1500); *Machan* v. *Machan and Gaunt (No. 2)*, (1966) 56 W.W.R. 435 (B.C.S.C.), ($750); *Dahl* v. *Dahl and Arnold*, *supra*, n. 14, ($1500, mitigated as engaged to re-marry); *Kraft* v. *Kraft*, (1969) 8 D.L.R. (3d) 744, (B.C.S.C.) ($3000); *Anderson* v. *Anderson and Mikolas* (1970), *supra*, n. 13, ($2500); *Pawlyshyn* v. *Pawlyshyn* (1973), 2 F.L.D. 2 (digested only), ($4000); *Korteling* v. *Korteling and Buse*, (1974) *supra*, n. 13, ($3000); *Sadler* v. *Sadler and Axen*, (1975) 3 F.L.D. 283 (B.C.C.A.), leave to appeal to S.C.C. from decision of the B.C.C.A. (Unreported 333/74, December 11, 1974) reducing damages from $7500 to $3500 denied; the majority of the B.C.C.A. had lowered the amount of damages after a comparison with other awards and with consideration for the change in the value of money. *Warman* v. *Warman and Root* (1975), *supra*, n. 13, ($3000); *Donaldson* v. *Donaldson* (1977), *supra*, n. 10, ($2500); *Blackburn* v. *Blackburn* (1977), *supra*, n. 14, ($1500); *Benz* v. *Willems*, (1978) 7 F.L.D. 63 ($1000); *Beveridge* v. *Beveridge* (1978), *supra*, n. 13, ($1000); *Kincaid* v. *Kincaid and Borman* (1978), *supra*, n. 13, ($2500); *Kemperman* v. *Kemperman* (1979), *supra*, n. 13, ($4000); *Arnott* v. *Arnott and Dickson*, (1979) 8 F.L.D. 416, ($3500); the court reduced the damages because of the petitioner's own previous adultery and neglect of his wife on the death of her father. *Parkes* v. *Parkes and Audette* (1980), *supra*, n. 16, ($2500). *Watters* v. *Watters and Stewart* (1980 B.C.S.C., 1981 B.C.C.A.), *supra*, n. 12, ($5000). *See also* from other jurisdictions: *Fediuk* v. *Lastiwka*, [1959] S.C.R. 262, (1959) 16 D.L.R. (2d) 545 (from Alberta), ($2000); *Kungl* v. *Schiefer*, (1962) 33 D.L.R. (2d) 278 (S.C.C.) (from Ontario), ($5000); *Chilson* v. *Neff*, (1976) 27 R.F.L. 333 (Sask. Q.B.), ($3500).

[23] *See, for example*, *Smith* v. *Smith and Morrow*, *supra*, n. 13; *Leighton* v. *Leighton and Swanson*, *supra*, n. 13; *Warman* v. *Warman and Root*, *supra*, n. 13.

[24] *Supra*, n. 1.

> **76.** (2) Where a proceeding under subsection (1) is joined with a proceeding for judicial separation or dissolution of marriage, the court may, where the alleged adultery is proved, order the adulterer to pay all or a part of the costs of the proceedings.

This section has been interpreted to mean that even if enticement or interference with reconciliation is not proved, so that the action for damages fails, costs of the proceedings may be awarded against the defendant simply on proof of the adultery.[25]

B. Alienation of Affections

In the United States, an action for "alienation of affections" grew out of the common law.[26] Originally the action was for the benefit of husbands only. Later women were permitted to bring actions for alienation of affections.[27] In some jurisdictions, it is also available to a child who has been deprived of the affections of his or her parent.[28] The action for alienation of affections has been abolished in twenty-five states and limited in five others.[29]

The law in England evolved quite differently. As Denning J. noted in *Gottlieb* v. *Gleiser*:[30]

> In most of the States of the United States of America they allow an action to be brought for what is called "alienation of affections." We know no such action in this country, nor is it to be desired. If a husband is to keep the affection of his wife he must do it by the kindness and consideration which he himself shows to her. He must put his faith in her, trusting that she will be strong enough to thrust away both the possessiveness of her parents and the designs of would-be lovers. If she is weak and false to her trust, the harm done cannot be righted by recourse to law; nor is money any compensation. The only thing for the husband to do is to set to work as best he can to mend his broken life, a task in which these courts cannot help him.

The position that has evolved in Canada is a combination of the developments in the United States and England. The action was recognized in a number of Canadian cases,[31] often joined with other actions, such as enticement or criminal conversation. But the action was laid to rest by the Supreme Court of Canada in *Kungl* v. *Schiefer* in 1962, a case in which damages were claimed for both criminal conversation and alienation of affections. In determining the law received into Ontario, Cartwright J. for the court, said:[32]

> In my opinion, there was in 1792 no case in the books and no case has since that date been decided in England holding that a husband is entitled to damages on proof of the fact that he has lost the affection of his wife by reason of the conduct of the defendant unless that conduct was such as would support an action for criminal conversation or an action for enticement or was itself tortious as, for example, if the defendant's conduct which results in the plaintiff's loss of his wife's affection was the publication of a libel concerning the plaintiff.

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[25] *Jarvis* v. *Jarvis*, *supra*, n. 16 at 11; *Jestley* v. *Jestley and Nissen*, *supra*, n. 13 at 316; *Lozada* v. *Lozada*, *supra*, n. 13 at 509. *Mitchell* v. *Mitchell and Duesterwald*, *supra*, n. 12 at 7. However, it does not appear to mean that costs of the divorce proceedings can be awarded against the co-respondent under s. 76 (2) of the *Family Relations Act* simply on proof of the adultery where a claim for damages has not been made under s. 76 (1); *Damberger* v. *Damberger and Clausen*, (1980) 12 F.L.D. 295 (B.C.S.C.); *Killer* v. *Killer*, (1973) 2 F.L.D. 64 (B.C.S.C.).

[26] Gregory L. Thompson, "Note: The Suit of Alienation of Affections: Can Its Existence be Justified Today?," (1980) 56 N.D.L. Rev. 239 at 240-243. *See also* Thomas K. Leeper, "Alienation of Affections: Flourishing Anachronism," (1977) 13 Wake Forest L. Rev. 585; Michael Earl McCann, "Alienation of Affections: Limitations on an Old Action," (1971) 16 S.D.L. Rev. 139.

[27] Thompson, *ibid.* at 242-243.

[28] *Ibid.* at 242.

[29] *Ibid.* at 247.

[30] [1958] 1 Q.B. 267 at 268 (Q.B.D.).

[31] *See, e.g., Bannister* v. *Thompson*, [1913] 15 D.L.R. 733, 29 O.L.R. 562, *affd.* [1914] 20 D.L.R. 512, 32 O.L.R. 34 (Ont. C.A.); *Osborne* v. *Clark*, (1919) 48 D.L.R. 558 (Ont. S.C./A.D.) (alienation of affections, enticement and harbouring); *Mowder* v. *Ray*, *supra*, n. 18 (criminal conversation and alienation of affections); *Mitchell* v. *Jolly*, [1960] O.R. 470 (Ont. C.A.) (enticement and alienation of affections); *Judge* v. *Smith*, (1961) 30 D.L.R. (2d) 521 (B.C.S.C.) (enticement and alienation of affections).

[32] *Supra*, n. 22 at 282.

The court held that although "alienation of affections" could be a factor in assessing damages in an action for criminal conversation or enticement,[33] it did not give rise to a separate cause of action.[34] The action has not been revived since 1962.[35]

C. Enticement and Harbouring of a Spouse

A spouse is entitled to damages against a person who induces the other spouse to leave ("enticement") or unlawfully conceals or shelters the other spouse ("harbouring").[36] Adultery is not an essential element of either action.[37]

1. Enticement

In an action for enticement, it must be shown that the defendant knew the party was married and intended to interfere with the marital relationship.[38] The enticing, procuring or persuading must be of a "positive character" and "[m]ere acquiescence or approval of the defendant to a cessation of cohabitation and *consortium* of a wife or husband is not sufficient proof . . . "[39]

For an action of enticement to succeed, it must be shown that, as a result of the defendant's conduct, the plaintiff lost the *consortium* of his or her spouse. In the usual case, loss of *consortium* is established by proving that the enticed spouse left the matrimonial home, but desertion is not an essential element of the tort.

2. Harbouring

The elements of the tort of harbouring a wife are set out by *Salmond* as follows:[40]

> It was actionable to harbour the wife of another, after a request by the husband to deliver her up, although the defendant did not procure her to leave her husband or know when he took her in that she was the wife of another, provided that loss of *consortium* is proved.

A defendant may successfully defend an action for harbouring by proving that he acted on humanitarian grounds. As a corollary, the court may consider whether a wife was justified in seeking refuge.

As with enticement, the gist of harbouring is the loss of the spouse's *consortium* and *servitium*. That the parties were unhappy together does not necessarily defeat the action.[41] But, it has been held that if the wife would not have returned to the husband anyway, the defendant's conduct did not cause the loss of *consortium* and therefore no liability is imposed.[42]

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[33] *Ibid.* at 285, 286-287.

[34] *Ibid.* at 286-287.

[35] Christine Davies, *Power on Divorce and Other Matrimonial Causes*, Vol. II (3d ed. 1980) at 110; *Rutherford* v. *Rutherford et al.* (B.C.S.C.) *supra*, n. 6 at 479 (D.L.R.); *see also* the comment of Spence J. in *Goodfriend* v. *Goodfriend*, (1971) 22 D.L.R. (3d) 699 (S.C.C.) at 701.

[36] *Place* v. *Searle*, [1932] 2 K.B. 497 (C.A.); *Kungl* v. *Schiefer*, *supra*, n. 22. It was also cited with approval by Macdonald J.A. of the British Columbia Court of Appeal in *Dallas* v. *Hinton*, (1937) 52 B.C.R. 106 at 123-124, a personal injury case; *see*, *e.g.*, *King* v. *Bailey*, (1901) 31 S.C.R. 33[illegible]; *Quick* v. *Church*, (1893) 23 O.R. 262 (Div. Ct.); *Marson* v. *Coulter*, (1910) 16 W.L.R. 157 (Sask. S.C.); *Webb* v. *Bulloch*, (1917) 13 O.W.N. 343 (H. Ct.); *Metcalf* v. *Roberts*, (1893) 23 O.R. 130 (Ch. D.); *Van Dorn* v. *Felger*, [1918] 3 W.W.R. 295 (Alta. A.D.); *Bannister* v. *Thompson*, (1914) 32 O.L.R. 34 (Ont. S.C.-A.D.); *Hanselman* v. *Gezy*, [1921] 2 W.W.R. 979 (Sask. C.A.); *McKillop* v. *Kennedy*, [1919] 1 W.W.R. 186 (Man. K.B.); *Homewood* v. *Beaton*, [1917] 1 W.W.R. 1308 (Sask. S.C.); *Winfrey* v. *Clute*, [1922] 2 W.W.R. 733 (Alta. S.C.-A.D.); *Osborne* v. *Clark*, (1919) 48 D.L.R. 558 (Ont. S.C.-A.D.).

[37] *Marson* v. *Coulter*, *ibid.* at 160. This principle has been reiterated in several cases including *Brune* v. *Stensto*, (1938) 52 B.C.R. 532 (B.C.S.C.) [1938] 1 W.W.R. 746.

[38] Fleming, *The Law of Torts*, (5th ed., 1977) at 635 at 636.

[39] *Mitchell* v. *Jolly*, *supra*, n. 31 at 473 per Laidlaw J.A.

[40] *Salmond on Torts*, (8th ed., 1981) at 335.

[41] *Thibideau* v. *Longmire*, (1959) 20 D.L.R. (2d) 763 at 769 (N.S.S.C.); *Brune* v. *Stensto*, *supra*, n. 37.

[42] *Spencer* v. *Relph*, [1969] N.Z.L.R. 713 (N.Z.C.A.).

In most enticement and harbouring cases, the actions are brought against lovers or suspected lovers. They have also been brought against a spouse's parents.

In *Gottlieb* v. *Gleiser*,[43] an English case, an action for enticement was brought against a mother-in-law and actions for harbouring were brought against the mother-in-law and father-in-law. It was held that the actions could not be maintained against parents-in-law.[44] In Canada, however, courts have entertained actions against parents-in-law.[45]

In at least one action in Canada, an allegation of enticement and harbouring was made against someone other than a parent of the spouse or a supposed lover. In *Brizard* v. *Heynen*,[46] a Manitoba case, an action for enticement and for harbouring was brought against the parish priest. At trial the plaintiff was awarded $2,500 in damages against the priest, but the verdict was reversed on appeal.

3. DAMAGES

Damages are awarded as compensation for loss of *servitium* and of *consortium*.

It is not entirely clear whether damages may also be awarded for losses other than the loss of *consortium* and *servitium* such as those available in an action of damages for adultery. Fleming suggests:[47]

> True to its origin, the gist of the claim is the husband's loss of his wife's services and society. The emphasis is thus on material loss though injury to honour and feelings swells the damages.

This view is consistent with that expressed by Turgeon J.A. for the Saskatchewan Court of Appeal, in *Hanselman* v. *Gezy*:[48]

> I have no doubt that a husband may recover for the injury to his feelings and the mental suffering to which the wrong has put him . . .

Adultery may increase the award of damages.[49]

Damages awarded in an action for enticement cover a wide range[50] and may be substantial. As one might expect, damages for harbouring are generally modest.[51]

D. Enticement, Harbouring and Seduction of a Child

1. ENTICEMENT AND HARBOURING

Contrary to popular expectations, an action by a parent against a person who entices away or harbours his child is based not on an express recognition of society's interest in maintaining the integrity of the family but rather on the property interest a parent has, as master of his child, in the services of that child:[52]

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[43] *Supra*, n. 30.

[44] That decision has been criticized: *Winchester* v. *Fleming*, [1958] 1 Q.B. 259; *see also* Milner, "Injuries to Consortium in Modern Anglo-American Law," (1958) 7 Int'l. & Comp. L.Q. 417 at 429. *But see Hay* v. *Williamson*, [1981] 1 N.Z.L.R. 526 (S.C. Auckland) where an action against parents-in-law for the enticement of a wife and children was struck out following *Gottlieb*, *supra*, n. 30.

[45] *Metcalf* v. *Roberts*, *supra*, n. 36; *Webb* v. *Bulloch*, *supra*, n. 36; *Osborne* v. *Clark*, *supra*, n. 36; *Luoma* v. *Jalava*, (1926) 30 O.W.N. 16; *McBay* v. *Merritt*, [1936] 4 D.L.R. 319 (N.B.A.D.).

[46] (1914) 27 W.L.R. 308 (Man. C.A.).

[47] Fleming, *supra*, n. 38 at 636.

[48] *Supra*, n. 36 at 982.

[49] *Williamson* v. *Werner*, [1946] 1 W.W.R. 659 (Alta. S.C./A.D.) at 661 *per* Frank Ford J.A. *See also Marson* v. *Coulter*, *supra*, n. 36, *contra* at 162 but the court did not wish to do indirectly what it could not do directly having found that the Supreme Court of Saskatchewan had no jurisdiction to hear a criminal conversation action.

[50] *Winsmore* v. *Greenbank*, (1745) Willes 577, 125 E.R. 1330; *Metcalf* v. *Roberts*, *supra*, n. 36; *Bannister* v. *Thompson*, *supra*, n. 36; *Webb* v. *Bulloch*, *supra*, n. 36; *Hanselman* v. *Gezy*, *supra*, n. 36; *Luoma* v. *Jalava*, *supra*, n. 45; *Thibideau* v. *Longmire*, *supra*, n. 41.

[51] *Marson* v. *Coulter*, *supra*, n. 36; *Homewood* v. *Beaton*, *supra*, n. 36; *Van Dorn* v. *Felger*, *supra*, n. 36; *McKillop* v. *Kennedy*, *supra*, n. 36.

[52] P.M. Bromley, *Family Law*, (5th ed., 1976) at 348.

> At common law one could obtain damages for the abduction of one's heir. But the action did not extend to the abduction of other children, and although it has never been formally abolished, it is now completely obsolete. This meant that there was no civil remedy for interference with parental rights—a gap which the common law judges filled at the latest in 1653 by adapting the existing action which a master had for the loss of his servant's services and permitting a parent to sue alleging as special damage the loss of his child's services. It thus became an actionable tort to do any act which wrongfully deprives a parent of his child's services. This is an independent cause of action vested in the parent.

Where the loss of the child's services is the result of an intentional act by a third person, the action would usually be for enticement, harbouring or seduction,[53] either independently, or in some combination.

At common law, only the father or other person *in loco parentis* has the right of action in most cases. The mother has a right only where she has sole custody or derives the right to the services of the child from some other base.[54]

Actions for enticement and harbouring of children are uncommon. The only successful Canadian case known to us is *Moore* v. *Walters*,[55] decided in 1919. The last successful English case for harbouring and enticing a child is *Lough* v. *Ward*, decided in 1945.[56]

2. Seduction

A parent has a right of action against a person who seduces his child, provided he can establish that the child rendered him services. The parent must also prove that he has suffered a loss of his child's services as a result of the seduction. Usually, this requirement is satisfied by proving the girl's resulting pregnancy and the consequential loss of her services during pregnancy or confinement.[57] If intercourse took place between the defendant and the girl, but paternity cannot be established, the action cannot be maintained.[58] It is not necessary to prove that the defendant enticed or made promises which induced the child to consent to sexual intercourse.[59] Furthermore, the previous unchastity of the seduced person does not affect the right to bring the action.[60] After some earlier decisions to the contrary,[61] it was established by the Judicial Committee of the Privy Council in *Mattouk* v. *Massad*[62] that the action was equally available where the girl had been raped by the defendant.

It is unclear whether the action may be brought where the loss of services does not result from pregnancy or childbirth. There is some authority for the position that other illness of the child resulting from sexual intercourse will suffice. In *Manvell* v. *Thompson*,[63] an action brought by an uncle for the

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[53] Except in those instances where the child has an independent tort action against the wrongdoer, in which case, the parent's action would be the general one for loss of services; *e.g.*, if the child was the object of a battery. An exception would be rape, where the parent would have an action for seduction but the child would also have an independent action.

[54] Fleming, *supra*, n. 38 at 639-40.

[55] (1919) 50 D.L.R. 336, [1919] 3 W.W.R. 806. (Sask C.A.). It appears that an enticement action was brought by a father in *MacMillan and MacMillan* v. *Brownlee*, [1935] 1 W.W.R. 199 (Alta. S.C.-A.D.) *per* Lunney J.A. at 236; *rev'd*. [1937] S.C.R. 318, *affd*. [1940] 2 W.W.R. 455 (P.C.). The action failed as loss of services was not proved. One was also brought in *Cole* v. *Hubble*, (1895) 26 O.R. 279. The jury found that enticement of the daughter had taken place but could not agree on the damages.

[56] [1945] 2 All E.R. 338 (K.B.D.).

[57] *E.g.*, *D.* v. *Hilligen*, (1955) 15 W.W.R. 287 (B.C.S.C.) *Beetham* v. *James*, [1937] 1 K.B. 527, [1937] 1 All E.R. 580.

[58] *Eager* v. *Grimwood*, (1847) 1 Ex. 61, 154 E.R. 26.

[59] *Gibson* v. *Rabey*, (1916) 10 W.W.R. 199 (Alta. S.C.-A.D.) *per* Beck J.A. at 203-204. *See also MacMillan and Macmillan* v. *Brownlee*, (P.C.) *supra*, n. 55; *Cline* v. *Bastle*, [1928] 3 W.W.R. 11 (Alta. S.C.), *Bilinski* v. *Kowbell*, [1931] 2 W.W.R. 245 (Sask. C.A.).

[60] *Martin* v. *Bezpflug*, [1919] 3 W.W.R. 893 (Sask. C.A.).

[61] For a review of some of the cases *see* the judgment of Harvey C.J.A. in the Alta. S.C.-A.D. decision in *MacMillan and MacMillan* v. *Brownlee*, *supra*, n. 55 at 202-204.

[62] [1944] 3 W.W.R. 169 (P.C.).

[63] (1827) 2 Car. & P. 304, 172 E.R. 137.

seduction of his niece, it was sufficient that after the seduction, the girl was "in a state of very great agitation" received medical attention, and "was obliged to be watched, lest she should do herself some injury." Pregnancy is not essential to the action according to *dicta per* Martin J.A. of the Saskatchewan Court of Appeal in *Bilinski* v. *Kowbell*,[64] and a number of writers.[65]

We are not aware of any instance where an action has been brought for the seduction of a male child or servant. Prosser has suggested[66] that "there probably is no good reason why the action should not lie." The only theoretical impediment to the action is the requirement that the seduction result in a loss of services to the plaintiff. If this requirement can be satisfied by illness rather than by pregnancy or childbirth, the action should be maintainable where the seduced male has, for example, contracted venereal disease or has suffered other illness as a consequence of the seduction.

Although the essence of the action for seduction is the recovery of pecuniary loss, consisting of the value of lost services and out-of-pocket expenses,[67] damages may also be awarded for the injured feelings of the parent.[68] Where the action is brought by a master who has no other tie with the seduced person, the damages are limited to out-of-pocket expenses incurred as a result of the loss of services.[69]

The court may consider such factors as the dishonour to the plaintiff and loss of the seduced person's comfort and society.[70] Exemplary damages may be awarded[71] and damages are often punitive.[72] The bad character of the child can be alleged in mitigation of the damages[73] and the conduct of the plaintiff himself can be scrutinized.[74]

We are aware of only one reported case in British Columbia where an action for the seduction of a child has been brought.[75] We are unaware of how frequently it is threatened.

The requirement that the plaintiff must have been deprived of the child's services leads to the anomalous result that where the child is seduced by an employer and is no longer rendering services to a parent, no one is entitled to bring an action.[76] Similarly, where the child has different employers at the date of the seduction and the date of the loss of service, no action will be maintainable.[77]

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[64] *Supra*, n. 59 at 248; *see also Harrison* v. *Prentice*, (1897) 28 O.R. 140, *affd*. (1897) 24 O.A.R. 677 (Ont. C.A.) where Rose J. found in reviewing earlier Ontario decisions that pregnancy was essential but where two of the appeal judges seemed to indicate that pregnancy was not essential.

[65] *See* Fleming, *supra*, n. 38 at 639; *Clerk & Lindsell on Torts*, (13th ed., 1969) at 832; Street, *The Law of Torts*, (4th ed.) at 393.

[66] Prosser, *supra*, n. 2 at 906.

[67] *Bilinski* v. *Kowbell*, *supra*, n. 59.

[68] Holdsworth, *A History of English Law*, Vol. VIII, at 429.

[69] *McKenzie* v. *Hardinge*, (1906) 23 T.L.R. 15.

[70] *Bilinski* v. *Kowbell*, *supra*, n. 59 *per* Martin J.A. at 248.

[71] *Ibid*.

[72] *Encyclopaedia of the Laws of England*, 2nd ed., Vol. 9, at 52.

[73] *Verry* v. *Watkins*, (1836) 7 Car P. 308, 173 E.R. 137 (£5 awarded); *Carpenter* v. *Wall*, (1840) 11 Ad. & E. 803, 113 E.R. 619. Where the woman has an action, unsuccessful attempts to attribute unchastity to her in defence can increase damages: *Martin* v. *Bestpflug*, *supra*, n. 59. But her age is not relevant: *Tullidge* v. *Wade*, (1769) 3 Wils. K.B. 18, 95 E.R. 909; held not to be a mitigating factor that the woman seduced was 30 years old.

[74] *Reddie* v. *Scoolt*, (1794) Peake 316, 170 E.R. 169.

[75] *D.* v. *Hilligen*, *supra*, n. 57.

[76] *Whitebourne* v. *Williams*, [1901] 2 K.B. 722. Unless she is hired away with the intention of seduction, *Speight* v. *Oliviera*, (1819) 2 Stark. 493, 171 E.R. 715.

[77] *See MacMillan and MacMillan* v. *Brownlee* (Alta. S.C.-A.D.), *supra*, n. 55 *per* Harvey C.J.A. at 214-215.

3. When is a Parent Owed Services by a Child?

A party who has commenced an action for enticement, harbouring or seduction must show that he was entitled to services from the child, but the burden of proof on this issue is easily satisfied:[78]

> Loss of services postulates a right to services. This requirement has likewise been attenuated to a point where it is often little more than a pretence. If the child is under age, a mere right to its service is deemed sufficient; though if it is of tender years, its inability to render domestic assistance would still preclude recovery, except for necessary medical expenses. If of full age, proof of actual services rendered is required, though the evidence need be but slight, and any *de facto* service, however trivial, such as making a cup of tea, milking cows, or occasionally assisting in the running of the household, is sufficient.

The master-servant relationship which underlies these actions must exist at both the date on which the tort was committed and when the services were lost.[79]

If the child is a minor, actual services need not be proved.[80] It is presumed that the parent-child relationship carries with it an implied contract of service.[81] The presumption may be rebutted if the child is too young to render services,[82] or is living away from home in the service of another.[83]

Once the child reaches the age of majority, loss of actual services must be proved.[84] These services need not be substantial. In *Beetham* v. *James*,[85] the 22-year-old daughter worked during the day "but in the evening she helped to wash up, and also helped . . . with the ironing and did her own room."

At common law, although services are owed to the parent or other person who stood *in loco parentis* to the child, the father usually derived the right of action from his status as head of the household.[86] Even if the child were of age, services were deemed to be owed to the father, rather than the mother,[87] notwithstanding that the mother of an illegitimate child is generally considered to have the right to her child's services.[88] The natural father of the child was allowed to bring the action as head of the household in which the child lived, unless the mother had sole custody, or derived the right to services on some other basis.[89]

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[78] Fleming, *The Law of Torts*, (5th ed., 1977) 639-40.

[79] *Peters* v. *Jones*, [1914] 2 K.B. 781; *Beetham* v. *Jones*, *supra*, n. 57; *MacMillan and MacMillan* v. *Brownlee* (Alta. S.C.-A.D.), *supra*, n. 55 at 215.

[80] *Beetham* v. *Jones*, *ibid.* at 530.

[81] *Peters* v. *Jones*, *supra*, n. 79 at 786.

[82] Fleming, *supra*, n. 38, *Clerk & Lindsell on Torts*, *supra*, n. 65 at 832 citing *Hall* v. *Hollander*, (1825) 4 B. & C. 660, 107 E.R. 1206, a personal injury case.

[83] *Ibid.*, Fleming, *supra*, n. 38 at 639 fn. 44. Bromley, *supra*, n. 52 at 349; *see also Grinnell* v. *Wells*, (1844) 7 Man. & G. 1033, 135 E.R. 419 and *Dean* v. *Peel*, (1804) 5 East. 45, 102 E.R. 986. The parent's right to the services of a minor child revives automatically upon the child leaving the service of another. *Hebb* v. *Lawrence*, (1890) 7 Man. R. 222 (Man. Q.B.); *Terry* v. *Hutchinson*, (1868) L.R. 3 Q.B. 599 considered in Bromley, *supra* at 349; *see also, e.g.*, *Rist* v. *Faux*, 4 B. & S. 409, 122 E.R. 513 (Exch).

[84] Clerk & Lindsell, *supra*, n. 65 at 835. Bromley, *supra*, n. 38 at 349. Fleming, *supra*, n. 38 at 639-640. *Peters* v. *Jones*, *supra*, n. 79 at 784.

[85] *Supra*, n. 57.

[86] Fleming, *supra*, n. 38 at 640; *Beetham* v. *James*, *supra*, n. 57 at 531-532; *Eitner* v. *Benneweis*, (1894) 24 O.R. 407 (Ch. D.) *per* Boyd C. at 409:

> Here the service of the daughter would be in law attributable to the father and not to the mother. That is, the common law right to service is given to the man who is deemed the head of the family. That relation is not changed because of his personal infirmity or decrepitude, as it is a legal result flowing from the family status. There is no divided right or co-ordinate power of control during the joint-lives; all is in the husband. That being so, the right of action as master vested in him during his life, and it does not pass to his widow as such upon his death.

And see Smith and Wife v. *Crooker*, (1863) 23 U.C.Q.B. 84, where the action by husband and wife was held to be bad as only the husband could be master. *See also* the review of case law in *Stoner* v. *Skene*, (1918) 44 O.L.R. 609.

[87] *Ibid.*

[88] Bromley, *supra*, n. 52 at 350; Fleming, *supra*, n. 38 at 640; *and see Vickers* v. *Robinson*, [1946] O.W.N. 812 (Ont. C.A.).

[89] *Supra*, n. 38 at 639-40.

Rights to custody have been altered by legislation. The *Family Relations Act*[90] provides as follows:

> . . . the persons who may exercise custody over a child are, where
> (a) the father and mother live together, the father and mother jointly;

Consequently, the common law rule has probably been abrogated and either parent would have a right of action.[91]

E. Summary

Damages for adultery are awarded as compensation for losses of *servitium* and of *consortium* as well as hurt pride. Damages for enticement and harbouring of a spouse are intended to compensate for loss of *servitium* and of *consortium*, and there is some question whether they may also be awarded for hurt pride. Damages for enticement and harbouring of a child are awarded as compensation for loss of *servitium*. Damages for the seduction of a child are intended to compensate for loss of *servitium* and wounded parental feelings.

As we mentioned earlier, the action for loss of *consortium* has been abolished in British Columbia. Section 75 of the *Family Relations Act* provides as follows:

> **Abolished Remedies**
>
> **75.** No action shall be maintained for restitution of conjugal rights, loss of consortium, criminal conversation or jactitation of marriage.

That section raises several questions. What is meant by "loss of consortium?" The actions of damages for adultery and of enticement or harbouring of a spouse are not really actions for loss of *consortium*. They are actions in which a principal head of damage is loss of *consortium*. Damages for adultery has been expressly preserved by section 76. Does section 75 affect that action? Does section 75 abolish enticement and harbouring? Another question is what is meant by *consortium*? As we observed earlier, there is authority to the effect that *consortium* includes *servitium*. Damages for loss of *servitium* may have been abolished as well, perhaps doing away with the actions of enticement, harbouring and seduction of children.

It appears that damages for loss of *consortium* are no longer being given to a person whose spouse has been negligently injured by another, and that *consortium* includes *servitium* so that no damages may be awarded on that head either.[92] However, damages for loss of *consortium* and loss of *servitium* are still being awarded in cases involving intentional interference with domestic relations, namely, in actions for damages for adultery, and enticement or harbouring of a spouse.[93] It is anomalous that a right to damages for loss of *consortium* and of *servitium* depends upon whether a person is deprived of his spouse's society and services through negligence or an intentional act.

As we mentioned earlier, this Report is concerned with actions which provide damages to a spouse or parent for loss arising from intentional interference with a family relationship. We hope to examine the law governing similar damages arising from another's negligence in a separate project.

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[90] *Supra*, n. 1, s. 34 (1).

[91] Bromley, *supra*, n. 52 at 350; A.J. Bradbook and R.R.S. Tracey, "Loss of Services: An Anachronistic Alternative to the Child Custody Laws," (1977) 4 Monash U.L.Rev. 71, 73.

[92] *Guelph* v. *Samuelson*, (1976) 25 R.F.L. 394 (B.C.S.C.).

[93] *Rutherford* v. *Rutherford and Dennis*, (1979) 120 D.L.R. (3d) 473, 14 R.F.L. (2d) 41, 52 (B.C.S.C.), *aff'd.* [1981] 6 W.W.R. 485, (1981) 30 B.C.L.R. 145 (B.C.C.A.); *see also Jestley* v. *Jestley*, (1977) 4 B.C.L.R. 313 (B.C.S.C.).

A. General

Both spouses, if happily married, would have every reason to resent someone who interfered with their marriage. Similarly, a parent has an interest which is prejudiced when an outsider interferes with his relationship with his children.

Nevertheless, the actions which provide remedies for intentional interference with family relations are archaic in concept, depend upon a number of fictions respecting the internal relationships in a family, and apply in circumstances in which it is doubtful whether any remedy should lie. There are aspects of human relations which cannot be regulated effectively by law, and to grant legal recourse opens the door to abuse of process.

It is not surprising that these actions have been the subject of scrutiny by law reform bodies.[1] The trend, with minor exceptions, has been to recommend the abolition of these actions, and that has been done in a number of jurisdictions. The exceptions to abolition are few. New Zealand, for example, abolished all of these actions, except enticement or harbouring of a spouse, which was modified by legislation. The action for seduction, in some jurisdictions, has been modified by providing a presumption that the child owes his or her parents services.

B. Damages for Adultery

Law reform agencies in Scotland,[2] England[3] and New Zealand[4] have recommended abolition of the action for damages for adultery. In Ontario[5] and Newfoundland,[6] the abolition of the equivalent action of criminal conversation has been recommended.

Following on these recommendations, the action has been abolished in Scotland,[7] England,[8] New Zealand[9] and Ontario.[10] It has also been abolished in Australia[11] Bermuda,[12] Saskatchewan[13] and several of the United States.[14] Of those jurisdictions which have considered whether to abolish damages for adultery, only Prince Edward Island has retained it.[15]

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[1] *See, e.g.*, Ontario Law Reform Commission, *Report on Family Law—Part 1—Torts* (1969); Scottish Law Commission, *Report on Liability for Adultery and Enticement of a Spouse* (1976), Scot. Law Com. No. 42; English Law Commission, *Report on Financial Provision in Matrimonial Proceedings*, Law Com. No. 25 (1969); Report of the Torts and General Law Reform Committee of New Zealand, *Miscellaneous Actions*, (1968); Newfoundland Family Law Study, *Project XII—Some Aspects of Torts in Family Law* (1970); E.R. Alexander, *The Family and the Law of Torts* (1978) at 4-10; Davies, *Power on Divorce* (3rd ed., 1980) at 109, 118-19; Fleming, The Law of Torts (5th ed., 1977) at 646; William M. Kelly, "The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship," (1972/73) 48 Notre Dame L. Rev. 426; Peter Brett, "Consortium and Servitium: A History and Some Proposals—Part III," (1955) 29 A.L.J. 428; Stephen Cretney, "Law Reform (Miscellaneous Provisions) Act 1970," (1970) 33 Mod. L.Rev. 534; Glanville Williams, "Some Reforms in the Law of Tort," (1961) 24 Mod. L.Rev. 101 at 109; Nathan P. Feinsinger, "Legislative Attack on 'Heart Balm,'" (1935) 33 Mich. L. Rev. 979; Stella J. Bailey, "A Married Woman's Right of Action for Loss of Consortium in Alberta," (1979) 17 Alta. L. Rev. 513.

[2] *Ibid.* at 6.

[3] *Supra*, n. 1 at 50.

[4] *Supra*, n. 1 at 9.

[5] *Supra*, n. 1 at 98.

[6] *Supra*, n. 1 at 17.

[7] *Divorce (Scotland) Act 1976*, S.U.K. 1976, c. 39, s. 10.

[8] *Law Reform (Miscellaneous Provisions) Act 1970*, S.U.K. 1970, c. 33, s. 4.

[9] *Domestic Actions Act 1975*, S.N.Z. 1975, No. 53, s. 2. It has been held, however, that abolishing damages for adultery does not prevent the court from awarding costs against a co-respondent whether or not adultery has taken place. *See Quinlan* v. *Quinlan and Another*, [1977] 1 N.Z.L.R. 97 (Auckland S.C.).

[10] In *Skinner* v. *Allen*, (1977) 81 D.L.R. (3d) 592, the Ontario Court of Appeal held that *The Family Law Reform Act, 1975*, S.O. 1975, c. 41 was sufficient to abolish the action. It was clarified by *The Family Law Reform Act, 1978*, S.O. 1978, c. 2, s. 69 (1).

[11] *Family Law Act, 1975* (Com.) No. 53 of 1975, s. 120.

[12] *Law Reform (Miscellaneous Provisions) Act*, 1977 (No. 3 of 1977), (1978) 4 C.L.B. 21.

[13] *An Act to Amend The Queen's Bench Act*, S.S. 1977-78, c. 31, s. 2.

[14] Prosser, *Handbook of the Law of Torts*, (3rd ed., 1964), 909.

[15] *Coles* v. *Roach*, (1980) 112 D.L.R. (3d) 101 (P.E.I.S.C.).

In our view, the action for damages for adultery does not achieve the results for which it was originally intended and its present functions are undesirable. It is based on an outdated view of marital breakdown and originated in the concept of a husband's proprietary interest in his wife. It can lead to serious injustice, bitterness and anomalous results. Considerable uncertainty surrounds the principles for the assessment of liability and damages. Moreover, it is undesirable to retain an action which may be brought after divorce, prolonging the agony of marital breakdown:[16]

> [It is desirable to] prevent unnecessary judicial post mortems on dead marriages so that those marriages can be buried with the maximum decency and dignity and the minimum bitterness and hostility.

In the Working Paper which preceded this Report, we tentatively concluded that the action for damages for adultery contained in section 76 (1) of the *Family Relations Act* should be abolished, as well as the courts' jurisdiction, under section 76 (2) to award costs of all proceedings against the co-respondent where a petition for divorce or judicial separation is joined with a claim of damages for adultery.

We proposed in the Working Paper that section 76 be amended to provide as follows:

> 76. No claim for damages shall be made by a spouse against any person on the ground that the person has committed adultery with his spouse.

Our correspondents agreed with this conclusion. One submission suggested that section 76 of the *Family Relations Act* should be revised to read as follows:

> 76. No action shall be brought by a spouse against any person on the ground that the person has committed adultery with his spouse.

Our correspondent was concerned that the formulation we proposed might still permit an application for an injunction. We are not wholly persuaded that that is a real danger, and a broader formulation, as suggested by our correspondent, risks abolishing actions which should be maintainable. For example, our correspondent's suggestion might even apply to a petition for divorce.

Upon reconsideration, we have concluded that the proposal in the Working Paper should be adopted.

The Commission recommends that:

1. Section 76 of the Family Relations Act, *R.S.B.C. 1979, c. 121 be repealed and a section similar to the following be substituted:*

76. No claim for damages shall be made by a spouse against any person on the ground that the person has committed adultery with his spouse.

C. Enticement and Harbouring of a Spouse

1. The General Trend

In 1963, the English Law Reform Committee recommended that the actions for enticement and harbouring be abolished.[17] The Law Commission made the same recommendation in 1969 in its *Report on Financial Provision in Matrimonial Proceedings*.[18] These recommendations were implemented by the *Law Reform (Miscellaneous Provisions) Act 1970*.[19]

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[16] Scottish Law Commission, *supra*, n. 1 at 13.

[17] Law Revision Committee, *Eleventh Report, Loss of Services*, (1963) Cmnd. 2017, 10-11.

[18] English Law Commission, *supra*, n. 1 at 50.

[19] *Supra*, n. 8, s. 5.

Abolition of both actions has also been recommended by law reform agencies in Ontario,[20] Saskatchewan,[21] Newfoundland[22] and South Australia.[23] The Scottish Law Commission recommended abolition of the enticement action.[24] To date, these recommendations have been adopted by legislation in Ontario[25] and South Australia.[26]

The action for enticement of a spouse has also been abolished by federal legislation in Australia[27] and enticement and harbouring have been abolished in Bermuda.[28]

2. New Zealand

In 1968, the Torts and General Law Reform Committee of New Zealand recommended, *inter alia*, the abolition of the actions of damages for adultery and of harbouring a wife but advocated the retention of the action of enticement of a spouse. The Committee conceded that the action was "distasteful," but felt this did not warrant "refusing a remedy where there has been a wrong."[29] Nor did the Committee consider that the difficulty in assessing damages was sufficient cause for abolition.[30] The blackmail argument was rejected on the ground that so long as damages were awarded on a compensatory basis, enticement actions were no more dangerous than other tort actions.[31] As well, they noted that the potential for abuse could be limited by a restriction on publication of reports as in divorce proceedings. The Committee, however, recommended that the action be modified.[32]

The action for harbouring a wife was abolished in New Zealand by section 4 of the *Domestic Actions Act 1975*.[33] Section 3 of that Act preserved, with modifications, the action for enticement of a spouse.

It is not surprising that actions for enticement have increased in popularity in New Zealand since the passage of this Act.[34] As damages for adultery and costs against a co-respondent are no longer available, the action for enticement remains the only method for compelling third parties to finance divorces.[35]

The revival of the action has been severely criticized in an article by Paul East:[36]

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[20] Ontario Law Reform Commission, *supra*, n. 1 at 98.

[21] Law Reform Commission of Saskatchewan, *Tentative Proposals For an Equality of Status of Married Persons Act* (1981).

[22] Newfoundland Family Law Study, *supra*, n. 1 at 17.

[23] Eleventh Report of the Law Reform Committee of South Australia, *Law Relating to Women and Women's Rights* (1970) at 6.

[24] Scottish Law Commission, *supra*, n. 1 at 16.

[25] *The Family Law Reform Act, 1978*, *supra*, n. 10, s. 69 (2).

[26] *Statutes Amendment (Law of Property and Wrongs) Act, 1972*, S.S.A. 1972, No. 19, s. 13.

[27] *Supra*, n. 11. For an argument that this legislation is unconstitutional *see* A.J. Bradbrook and R.R.S. Tracey, "Loss of Services: An Anachronistic Alternative to the Child Custody Laws," (1977) 4 Monash U.L. Rev. 71 at 76-78. *And see In the Marriage of Yule*, (1976) 11 A.L.R. 173 (F.C.A.).

[28] *Supra*, n. 12.

[29] Report of the Torts and General Law Reform Committee of New Zealand, *supra*, n. 1 at 8.

[30] *Ibid.* at 8.

[31] *Ibid.* at 9.

[32] *Ibid.* at 9-10. The New Zealand Committee recommended that the action for enticement be modified by:

(1) freeing it from its loss of services origins;
(2) clarifying that it be available to both sexes;
(3) providing for the settlement of damages for the benefit of the children;
(4) restricting publication of reports;
(5) providing that a finding of adultery in divorce proceedings not be admissible "against the defendant in an enticement action unless the defendant appeared in and contested the divorce proceedings;" and
(6) clarifying that "it should be a defence if the enticed spouse had a just cause for leaving the other spouse *or* if the enticer proves that he believed, *on reasonable grounds*, that the enticed spouse had just cause."

[33] *Supra*, n. 9.

[34] Paul East, "Enticement—the Writ of Ravishment Revised," [1977] N.Z.L.J. 507.

[35] Doug Wilson, "Enticement of a Spouse: A Revival?" [1976] N.Z.L.J. 383 at 383-384.

[36] *Supra*, n. 34 at 509.

> The fact that the *Domestic Actions Act* states that an action may be brought by either a husband or a wife does little to alter the fact that the cause of action is based on a husband's proprietary interests in his wife and that it may stand in the way of many husbands and wives who but for this action would find much greater happiness and security by leaving their respective spouses and forming a relationship with someone else. It will certainly actively discourage many people from leaving an unbearable matrimonial situation and now that it is revived it will doubtless be a matter that solicitors will often be called upon to discuss with their clients. Obviously clients who decide to form permanent relationships outside their marriages will have to be advised of the risk of having proceedings for enticement brought against them . . .

3. Recommendation

In the Working Paper we tentatively concluded that the actions of enticement and harbouring of a spouse, like the action of damages for adultery, were out of step with modern attitudes toward marital breakdown and had the potential to do more harm than good. This was particularly so if damages for adultery were to be abolished and the action for enticement retained. A resurgence in its use, as has occurred in New Zealand, would be predictable and, in our view, thoroughly undesirable. We proposed that these actions be abolished. Our correspondents agreed. We see no reason to depart from our original conclusion.

The Commission recommends that:

2. The actions of enticement and harbouring of a spouse be abolished.

D. Enticement and Harbouring of a Child

In 1963, the English Law Reform Committee recommended that the actions of enticement and harbouring of children be abolished.[37] In 1969, this position was reiterated by the Law Commission.[38] The actions were abolished by section 5 of the *Law Reform (Miscellaneous Provisions) Act 1970*.[39]

In 1969, the Ontario Law Reform Commission recommended abolition of the actions of enticement and harbouring of children.[40] In coming to its conclusion, the Commission commented that:[41]

> The extension of the master's right to the services of his servant to the parent-child relationship does not belong to this century.

The Commission's recommendation was implemented by section 69 (4) of *The Family Law Reform Act, 1978*.[42]

The Law Reform Commission of Saskatchewan tentatively recommended the abolition of the action of enticement of a child in 1979, and confirmed this recommendation in 1981.[43] The Saskatchewan Commission commented:[44]

> It is important to note, however, that the expansion of the law of enticement and seduction took place before the equitable doctrine of *parens patriae* had fully developed. Enticement and seduction, to the extent that they create an absolute parental right based upon presumed loss of services, are incompatible with the equitable welfare principle.

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[37] *Supra*, n. 17 at 10-11.

[38] English Law Commission, *supra*, n. 1 at 50.

[39] *Supra*, n. 8.

[40] Ontario Law Reform Commission, *supra*, n. 1 at 105.

[41] *Ibid.* at 104.

[42] *Supra*, n. 10.

[43] *Tentative Proposals Relating to the Civil Rights of Children*, (December, 1979) at 60. *See* discussion at 37–40, confirmed by *Proposals on Custody, Parental Guardianship, and the Civil Rights of Minors* (December, 1981) at 32-33.

[44] *Ibid. Tentative Proposals* at 38.

The Newfoundland Family Law Study suggested in 1970 that the actions of enticement and harbouring of a child should be abolished.[45]

In 1968, the Torts and General Law Reform Committee of New Zealand[46] also proposed that the actions of enticement and harbouring of a child be abolished on the ground that other remedies were sufficient for the protection of children and of the parent-child relationship. The Committee also commented that:[47]

> There seems no social justification for the award of monetary compensation to the parent.

These actions were abolished in New Zealand in 1975.[48]

In 1972, the actions for enticement and harbouring were abolished in South Australia[49] following the recommendations of the Law Reform Committee of South Australia.[50]

In summary, no law reform agency which has considered the actions of enticement or harbouring of a child has advocated their retention and the actions have been abolished in Ontario, England, New Zealand and South Australia.

In considering whether the actions for harbouring and enticing children should be abolished or retained, it is necessary to determine if they are the best or perhaps the only remedies available in extraordinary circumstances.

Habeas corpus proceedings have been used in the past by parents seeking to have their children returned to them.[51] Another alternative would be the apprehension of the child as one "in need of protection" under the *Family and Child Service Act*.[52] The circumstances where a child is "in need of protection" are, however, fairly extreme, although they include:[53]

> . . . that [a child] is
>
> (e) absent from his home in circumstances that endanger his safety or well being.

The decision whether to proceed is in the hands of the Superintendent rather than the parent.[54] The Superintendent can return the child to the custodial parent[55] and the court can also order the return.[56]

The *Family Relations Act*[57] provides two other potential remedies in sections 36 and 37, which read as follows:

> **Civil enforcement of custody rights**
>
> **36.** Where custody of a child is awarded to a person by an order made or enforceable under this Act and the person is denied the exercise of custody, a court may, on ex parte application, order that the child be apprehended by a peace officer and taken to that person.

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[45] Newfoundland, Family Law Study, *Project XII, Some Aspects of Torts in Family Law*, (1970) at 17.

[46] Report of the Torts and General Law Reform Committee of New Zealand, *supra*, n. 1 at 12-13.

[47] *Ibid.* at 13.

[48] *Domestic Actions Act 1975*, *supra*, n. 9, s. 4.

[49] *Supra*, n. 26.

[50] Eleventh Report of the Law Reform Committee of South Australia, *Law Relating to Women and Women's Rights*, 1970 at 6.

[51] The basis of the use of the writ is as follows:

> It is undeniable that the fact of a child being in the custody of a person other than its legal guardian, has been treated as a restraint of the child's liberty.

In contrast to the action for enticement of a child, however, the parent's rights as against the child's only appear to apply up to the "age of discretion," age 14 for boys and age 16 for girls. Furthermore, the writ is used to order the child returned to the parent, whereas the injunction in an action for enticement compels the third party to no longer entice or harbour the child. The latter may be preferable where the inclination of the child would be to just run away from the parent again if ordered returned. The *habeas corpus* proceeding, therefore, has some severe limitations from a parental point of view.

[52] S.B.C. 1980, c. 11. Proclaimed in force effective June 1, 1981.

[53] *Ibid.* section 1.

[54] *Ibid.* section 9.

[55] *Ibid.* section 9 (5).

[56] *Ibid.* sections 11 and 13.

[57] R.S.B.C. 1979, c. 121.

Order prohibiting interference with child

37. Where a court makes a custody order or a custody order is enforceable by a court, the court may order that a person

(a) shall not enter premises, including premises the person owns or has a right to possession of, where the child resides from time to time;

(b) shall not make contact or endeavour to make contact with or otherwise interfere with either the child or any person having custody of or access to the child; or

(c) where a court concludes that the person named in its custody order may not comply with an order under paragraph (a) or (b), the court may further order that the person

(i) enter into a recognizance, with or without sureties, in such reasonable amount as the court thinks necessary;

(ii) report to the court or person designated for the period of time, and at the times and places, as the court considers necessary and reasonable; or

(iii) deliver up to the court such documents as the court thinks fit

or any combination of these.

In making an order under sections 36 and 37, the court is required to "give paramount consideration to the best interests of the child."[58]

Sections 36 and 37 appear to have been enacted to meet the specific problem of enforcing custody after a custody dispute. These sections provide a remedy to a person entitled to custody pursuant to court order. A person entitled to exercise custody otherwise than by court order would not appear to be entitled to apply to the court under these sections, unless application is also made for a custody order.

The "persons who may exercise custody over a child" are defined in section 34 as follows:

Persons who may exercise custody

34. (1) Subject to subsection (2), the persons who may exercise custody over a child are, where

(a) the father and mother live together, the father and mother jointly;

(b) the father and mother live separate and apart, the parent with whom the child usually resides;

(c) custody rights exist under a court order, the person having those rights; and

(d) custody rights exist under a written agreement, the person to whom those rights are given.

(2) Where persons have conflicting claims to custody under subsection (1)

(a) the person having custody rights under a court order;

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[58] By s. 24 (1) of the Act:

Best interests of child are paramount

24. (1) Where making, varying or rescinding an order under this Part, a court shall give paramount consideration to the best interests of the child and, in assessing these interests, shall consider these factors:

(a) the health and emotional well being of the child including any special needs for care and treatment;

(b) where appropriate, the views of the child;

(c) the love, affection and similar ties that exist between the child and other persons;

(d) education and training for the child; and

(e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise these rights and duties adequately;

and give emphasis to each factor according to the child's needs and circumstances.

In a recent case before Bouck J. of the British Columbia Supreme Court (Vancouver Registry No. A812733, September 24, 1981), the parents of a nearly 16-year-old boy attempted to have the court intervene with respect to the boy's relationship with his former female teacher. The boy was living with the teacher and the parents alleged that sexual activity was taking place between them. The parents were unsuccessful in their attempts to separate the two or to get the boy to return home. The police and the Superintendent of Child Welfare declined to intervene, the latter as "she did not believe 'J' was in need of protection as these words are defined by law" (p. 3 of the judgment). The parents petitioned the court for interim custody, an order restraining the respondent from entering upon premises where the child may reside and an order that the respondent not make contact or endeavour to make contact with or otherwise interfere with the child or any person having custody of or access to the child. Although the court noted (at 1-2) that "no particular statutory authority for this application is raised by the petition" and therefore it rested on the inherent jurisdiction of the court, the relief sought parallels to a considerable extent the provisions of s. 37 of the *Family Relations Act*. The parties agreed that the boy stay in a foster home for one month but could not agree on access. His Lordship refused to grant an order restraining the respondent from access to the boy while he was in the foster home.

(b) where paragraph (a) does not apply, the person granted custody by an agreement;
(c) where paragraphs (a) and (b) do not apply, the person claiming custody with whom the child usually resides; or
(d) where paragraph (c) applies and 2 persons are equally entitled under it, the person who usually has day to day personal care of the child

may exercise custody to the exclusion of the other persons unless a court otherwise orders.

In the Working Paper we concluded that:[59]

> The remedies in sections 36 and 37 should be available to all persons having custody over children regardless of the source of their right to custody. A parent entitled to custody who wishes to use sections 36 and 37 should not have to have his right to custody approved by the court before being entitled to apply under these sections. In our opinion, modification of sections 36 and 37 will provide a remedy superior to those available through an action of enticement or harbouring. The court's order will be based upon considerations involving the best interests of the child, not upon a parental right to a child's services without regard to the child's best interests.

We received comment that expressed concern that these sections might be used by one parent against another as an alternative to custody proceedings. That would be undesirable since these sections do not have the necessary procedural safeguards attendant on a custody application:

> I am interested as well in the Working Paper's comments concerning sections 36 and 37 of the *Family Relations Act*. These sections were designed to assist the courts to offer practical assistance to persons to whom it had awarded custody of children. My initial assessment is that the extension of these remedies to the situation where no custody order exists is both unnecessary and could lead to the sections being employed in strange ways. Where a parent needs the court's assistance to protect against interference by a non-parent then *habeas corpus*, injunctive and like relief is and should be available. If there currently are impediments in seeking such relief then the law in these areas and not sections 36 and 37 needs reform. On the other hand, if the dispute is between two persons both of whom have a colour of right to custody of a child, and if it cannot otherwise be settled appropriately between the parties, then the custody issue itself should be settled by the court. Sections 36 and 37 then serve to help give effect to a court's ruling on the custody issue. If sections 36 and 37 were broadened to cover cases where no custody order yet existed would proceedings under sections 36 and 37 not then be used as alternative to custody proceedings by some litigants and, if so, do sections 36 and 37 then contain the necessary procedural safeguards?

The Commission did not intend that orders be made under sections 36 and 37 of the *Family Relations Act* in disputes between parents, except where one parent has obtained a custody order. In the Working Paper we made the following proposal:

> (b) Sections 36 and 37 of the *Family Relations Act*, R.S.B.C. 1979, c. 121 be amended to allow the court to make an order on the application of any person who may exercise custody as defined in section 34.

We agree with our correspondent's concerns. A custody order should be required where the dispute is between parents. Where the order for non-interference is sought against a third party, however, any person who may exercise custody as defined in section 34 should be able to bring an application under sections 36 and 37.

In the Working Paper, we also considered whether remedies should be available to the parents of adult children. In the United States, the quest for remedies with respect to adult children has arisen in the context of their

[59] At p. 26.

involvement in religious cults.[60] Various attempts have been made to extract adult children from cults, including resort to conservatorship or committee proceedings.

Although at common law a parent has the right of action for loss of the services of his adult child where the child renders actual service and where the loss results from seduction[61] or from physical injury,[62] it appears that a parent does not have a right of action for the enticement or harbouring of an adult child.[63] Logically, however, where an adult child renders actual services to a parent, the actions should be maintainable on a master and servant basis. The *Family Relations Act* provisions cited apply only to minor children.

Actions for enticement and harbouring might be retained and clarified or modified to allow their use with respect to adult children. We believe, however, that the provision of extraordinary rights to a parent to interfere in the life of an adult child should be considered only if there is evidence of a serious problem in British Columbia. One of our correspondents suggested that there were already adequate remedies for these problems. Another suggested that, if an alternative remedy is required, research indicates that a power to remove a person from a cult for a period of 30 days would probably adequately answer the problem. The consensus among our correspondents, however, was that cults do not currently represent a major problem in British Columbia, and consequently the Commission does not propose to recommend extraordinary remedies for those circumstances.

The Commission recommends that:

3. (a) *The actions of enticement and harbouring of a child be abolished.*
   (b) *Sections 36 and 37 of the* Family Relations Act, *be amended to allow the court to make an order on the application of any person who may exercise custody as defined in section 34.*
   (c) *An order under sections 36 or 37 of the* Family Relations Act, *sought against another person who is also entitled to custody, may not be made unless the court first makes a custody order.*

It should be observed that section 36 permits the court to make an order *ex parte*. The orders a court might make under section 37, prohibiting the interference with a child, may be made "where a court makes a custody order or a custody order is enforceable by a court." Consequently these orders may also be made *ex parte*. Since the court, under section 24 of the *Family Relations Act*, must determine the best interests of the child before making an order, usually it should hear representations on behalf of the child as well as the person against whom an order prohibiting interference might be made. On the other hand, circumstances will arise where it is imperative for a court application under section 37 to be heard expeditiously.

Section 22 of the *Family Relations Act* provides for the general approach to giving notice under Part 2 of the Act. It provides that each parent of the child affected by an application, and each adult person with whom the child usually resides, must be served with notice of the proceeding. Section 22 (2) provides that a court may, on *ex parte* application, dispense with such notice, or otherwise determine in what manner notice should be given. This practice

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[60] *See*, for example, Robert H. Green, "People v. Religious Cults: Legal Guidelines for Criminal Activities, Tort Liability, and Parental Remedies" (1977) 11 Suffolk U.L.Rev. 1025 and "Conservatorships and Religious Cults: Divining a Theory of Free Exercise" (1978) 53 N.Y.U.L.Rev. 1247.

[61] Glanville Williams, "Some Reforms in the Law of Tort," *supra*, n. 1 at 111.

[62] Handford, "Relatives' Rights and *Best v. Samuel Fox*," (1979) 14 W.A.L.Rev. 79 at 107.

[63] *See*, for example, *Salmond on Torts*, (16th ed. 1973) at 360; *but see* Bradbrook & Tracy, *supra*, n. 27 at 73, fn. 10.

might be desirable for proceedings under section 37. As it currently stands, an *ex parte* application under that section may be made as of right.

It is not clear whether it is necessary to amend section 37 to provide for notice to a person against whom is sought an order prohibiting interference with a child. While we have some concern that such orders should not generally be made *ex parte*, presumably the courts share these concerns, and *ex parte* applications are subject to rigorous scrutiny. In the Working Paper we tentatively concluded that section 37 need not be revised to require notice to a person against whom an order under that section might be made, but we invited comment on this issue. Our correspondents favoured *ex parte* hearings in these circumstances for two reasons. First, it is in the best interest of the child that the court be able to hear the matter expeditiously. Second, since judges carefully scrutinize *ex parte* applications, there are adequate safeguards in making a non-interference order against someone in his absence. One correspondent wrote as follows:

> The Commission will be aware that there is a provision in Sec 16 (4) Family and Child Service Act similar to Sec 37 of the Family Relations Act, but omitting the provision for an ex parte application.
>
> We have therefore been advised that individuals against whom an order is sought under the Family and Child Service Act provision must be notified. In an apprehension resulting from allegations of sexual abuse, the Superintendent may wish to obtain an order restraining the alleged offender from contact with the child during the interim period until a full hearing can be held. In this example, the Superintendent would be not only concerned with the safety of the child but also with protecting her from the emotional pressures that push her toward retraction of her statement before the case can be heard. The requirement to notify the alleged offender and thus give him the opportunity to argue against such an order being made would appear to present another forum for the argument of the facts of the case before all the evidence can be gathered and therefore to defeat its purpose. Situations of similar import may well be involved in matters before the court under the Family Relations Act. The person having custody of the child should have the protection of the law against harassment and influence of the other party until the court is able to review all of the facts. It is unfortunate that an ex parte provision lends itself to abuse when only one side of an issue is put before the court. Nevertheless, for the protection and safety of children involved in these disputes, I believe the provision should be available without the delays of serving notice on the other party.

We have further considered this issue and see no reason to depart from our earlier conclusion.

E. Seduction of a Child

In Canada, five of the common law jurisdictions have enacted statutory modifications to the common law relating to seduction.[64] The introduction of a presumption that services were rendered was common to all of the statutes. In Saskatchewan and Alberta,[65] an unmarried woman may also bring an action on her own behalf.

Modification by statute has proved to be an unsatisfactory solution to the anomalous and anachronistic nature of the action. In Ontario, on the recommendation of the Ontario Law Reform Commission, the action of seduction of a child was abolished by subsections 69 (4) and (5) of *The Family Law Reform Act* in 1978.[66] Abolition has also been recommended by the Law Reform

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[64] *The Seduction Act*, C.C.S.M. S60; *The Seduction Act*, R.S.S. 1978, c. S-43; *The Seducton Act*, R.S.A. 1970, c.334; *The Seduction Act*, R.S.O. 1970, c. 428, as amended, repealed *The Family Law Reform Act*, 1978, S.O.1978, c. 2, s. 69(5); *Seduction Ordinance*, R.O.N.W.T. 1974, c. 88. The history of the statutes is reviewed in Joliffe, "Seduction—Nature of Action—Female Plaintiff in Alberta—Powers of Trial Judge," [1935] 13 Can. B. Rev. 331.

[65] *Ibid.* s. 5 of each statute.

[66] *Supra*, n. 1 at 105.

Commission of Saskatchewan (with respect to children) and by the Law Reform Commission of Manitoba (with respect to servants and children).[67] In Newfoundland, abolition of the action was recommended in 1970.[68]

In England, abolition of the action of seduction was recommended in 1963 by the Law Reform Committee[69] and by the Law Commission in 1969.[70] The parent's right of action for the seduction or rape of a child was abolished by section 5 of the *Law Reform (Miscellaneous Provisions) Act 1970*.[71]

The Torts and General Law Reform Committee of New Zealand recommended in 1968 that the action of seduction of a servant or child be abolished.[72] This was accomplished by the *Domestic Actions Act, 1975*.[73] Although the Law Reform Committee of South Australia did not recommend abolition of the action because of representations from certain ethnic groups, the action was subsequently abolished in 1972.[74]

In those instances where a liaison results in the birth of an illegitimate child, legislation already provides an avenue for obtaining maintenance for that child and, in part, for the mother. As well, the *Criminal Code* specifies a number of offences for conduct which can arise from seduction and in many cases represents a more appropriate societal response than an action for the parent's injured feelings. For these reasons in the Working Paper we tentatively concluded that the action for seduction should be abolished,[75] and observed that abolishing a parent's right of action in these circumstances does not affect the legal remedies that may be available to the child. Our correspondents agreed with our proposal.

The Commission recommends that:

4. The action of seduction of a child be abolished.

F. Application

In the Working Paper, we discussed problems of application or transition that should be addressed when implementing our recommendations, but made no proposal in this regard. Our tentative conclusion was that none of the abolished actions should be maintainable even if the cause of action arose before legislation abolishing the action was enacted. We were concerned, however, that this approach might adversely affect parties who had already commenced actions.

We have further considered this issue. These actions are brought so seldom that few parties would be prejudiced if legislation abolishing actions arising out of intentional interference with domestic relations were retroactive. Moreover, our conclusion that these actions should be abolished is based in part upon the fact that legal intervention in these circumstances is largely unjustified. Nevertheless, the plaintiff in an action commenced before re-

[67] *Proposals on Custody, Parental Guidance and the Civil Rights of Minors* (December, 1981), at 33 and *"The Seduction Act"* (1979), Informal Report #9C at 20.

[68] Newfoundland Family Law Study, *Project XII—Some Aspects of Torts in Family Law*, (1970) 17.

[69] Law Reform Committee, *supra*, n. 17, para. 11.

[70] English Law Commission, *supra*, n. 1, para. 102.

[71] *Supra*, n. 8.

[72] *Supra*, n. 1 at 12.

[73] *Supra*, n. 9.

[74] *Supra*, n. 26.

[75] Several consequential amendments will be necessary if seduction is abolished:

(i) the *County Court Act*, R.S.B.C. 1979, c. 72, should be amended by deleting ", seduction" from s. 57 (1) and should be amended by deleting "seduction or" from s. 28 (b);

(ii) the *Small Claim Act*, R.S.B.C. 1979, c. 387, should be amended by deleting "seduction or" from s. 3 (c);

(iii) the *Limitation Act*, R.S.B.C. 1979, c. 236, should be amended by deleting s. 3 (1) (h).

forming legislation came into force should not be prejudiced. We have concluded consequently, that while these actions should not be maintainable, even if the cause of action arose before the implementation of legislation abolishing it, an exception should be made for actions commenced before enactment of such legislation.

The Commission recommends that:

5. *(a) Recommendations 1, 2, 3 (a) and 4 should apply whether or not the cause of action arose before legislation implementing these Recommendations comes into force.*

(b) Notwithstanding (a), an action commenced before legislation enacting Recommendations 1, 2, 3 (a) and 4 comes into force may be continued as if the legislation had not been enacted.

CHAPTER IV CONCLUSION

A. Statutory Remedy

Our conclusion is that existing remedies, which ostensibly protect family relations, are anachronistic and ineffective. Their potential for abuse adds additional weight to the conclusion that they should be abolished.

We are concerned, however, that abolishing these torts might be regarded as an attack on the institution of marriage. Torts of interference with domestic relations tend to recognize and support the respect generally given in our society to marriage and the family. In the Working Paper we observed:[1]

> There may be, however, some merit in retaining these actions as an expression of society's disapproval of certain conduct. We think that the disadvantages of these actions weigh heavily against retention. Perhaps it would be desirable to enact legislation which provides a remedy for intentional interference with family relations, provided the statutory remedy focuses upon protecting the relationship itself, and not upon providing damages for hurt feelings or loss of services or society. We are skeptical that such an approach is necessary, but we would appreciate comment on this issue. Legislation which might provide adequate protection for family relations should attempt to avoid the evils that exist under the current law. Such legislation might embody or reflect the following principles:
>
> (1) It is a tort, actionable without proof of damage, for a person, wilfully and without claim of right, to interfere with a relationship between another person and that person's spouse, parent or child.
>
> (2) The nature and degree of freedom from interference described in (1) to which a person is entitled is that which is reasonable, due regard being given to the lawful interests of others.
>
> (3) When considering what constitutes reasonable freedom from interference under (2), the court may have regard to whether the conduct
>
> (a) was consented to by some person entitled to consent; or
>
> (b) occurred in circumstances which would be privileged under the law of defamation.
>
> (4) An injunction may be granted with respect to any actual or apprehended interference that is actionable under (1).
>
> (5) An action or right of action under (1) is extinguished by the death of the person entitled to bring the action.

It is difficult to determine when a court should provide a remedy under such legislation, and what that remedy should consist of. For example, an 18-year-old child may leave home to live in a common law relationship with a 22-year-old woman. The parents, upset by this turn of events may blame the common law spouse for destroying their relationship with their son. Should they be entitled to a remedy for interference with that relationship? Would it make any difference if the son married, or intended to marry, his common law spouse upon obtaining majority?

Many people would probably agree that no remedy should be available in this kind of case. Perhaps the courts would have no trouble dealing with such legislation. We are reluctant, however, to endorse legislation that may encourage actions which cannot presently be brought for many innocent kinds of interference with family relationships.

On the other hand, there are many cases where a remedy might be desirable. For example, A, the owner of a bookstore, is reluctant to lose the services of B, the bookstore accountant. B is about to leave since B's spouse's employment involves an impending transfer to another part of the country. A might react in different ways. A might offer B a substantial salary increase in the hope that B would stay notwithstanding the spouse's departure. Alternatively, A might take positive steps, in the spirit of Iago, to poison the

[1] At 31.

marriage, perhaps going so far as to encourage or reward a third person to entice or seduce one of the spouses. Should either or both courses of conduct result in liability for A? Liability to whom—B, B's spouse or both? What should the measure of damages be? Clearly, there are many questions which must be resolved if this kind of approach is adopted.

In the Working Paper we invited comment on whether legislation along these lines was desirable. We suggested that perhaps the most telling argument in favour of this approach would be a perceived need for society to express its disapproval of certain kinds of conduct that injure family relationships. Nevertheless, we had some doubts whether a new tort, which made intentional interference with a family relationship actionable, would protect those relationships, and deter such conduct.

Our correspondents shared our concerns and did not favour the creation of a new statutory tort. The general view was that it would lead to the same abuses encountered in the abolished actions. One correspondent observed that a statutory tort would represent no improvement over the current law unless it defined the nature and degree of interference that was actionable and listed the remedies that were applicable.

The response we received, consequently, only confirmed our conclusion that a new statutory tort to protect family relationships was undesirable.

B. List of Recommendations

We have made the following Recommendations in this Report:

1. *Section 76 of the* Family Relations Act, *R.S.B.C. 1979, c. 121 be repealed and a section similar to the following be substituted:*

   76. *No claim for damages shall be made by a spouse against any person on the ground that the person has committed adultery with his spouse.* (Page 15)

2. *The actions of enticement and harbouring of a spouse be abolished.* (Page 17)

3. (a) *The actions of enticement and harbouring of a child be abolished.*

   (b) *Sections 36 and 37 of the* Family Relations Act, *be amended to allow the court to make an order on the application of any person who may exercise custody as defined in section 34.*

   (c) *An order under sections 36 or 37 of the* Family Relations Act, *sought against another person who is also entitled to custody, may not be made unless the court first makes a custody order.* (Page 21)

4. *The action of seduction of a child be abolished.* (Page 23)

5. (a) *Recommendations 1, 2, 3 (a) and 4 should apply whether or not the cause of action arose before legislation implementing these Recommendations comes into force.*

   (b) *Notwithstanding (a), an action commenced before legislation enacting Recommendations 1, 2, 3 (a) and 4 comes into force may be continued as if the legislation had not been enacted.* (Page 24)

It is important to remember that the abolition of these actions does not affect the rights of a spouse or child who has been injured by another. Recommendations 1 and 2 affect the rights of one spouse against a third party who has committed adultery with the other spouse, or who has enticed or

harboured the other spouse. Recommendations 3 and 4 affect the rights of a parent against third parties who have enticed, harboured or seduced the parent's child. If a spouse or child has been injured by another, their rights against that person are unaffected by these recommendations.

C. Acknowledgments

The Commission wishes to express its gratitude to a number of persons who have contributed to this Report.

We would like to thank those who responded to the Working Paper which preceded this Report. The submissions we received were well considered, and extremely useful in preparing this Report.

We would also like to express our gratitude to Ken Mackenzie, a former member of the Law Reform Commission. Mr. Mackenzie participated in the development of the Working Paper and in the deliberations on our final recommendations. His term as a Commissioner expired only shortly before the contents of this Report were settled.

The Commission also wishes to acknowledge the work of Gail Black, a former Legal Research Officer to the Commission, who was responsible for much of the research upon which the Working Paper and this Report are based, and to our Counsel, Thomas G. Anderson, who prepared this Report.

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